Supreme Court, U. S.
FILED
FEB 10 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1130

JASPER FRANK POTTS, - - *Appellant-Movant*

V.

COMMONWEALTH OF
KENTUCKY - - - - - *Appellee-Respondent*

APPEAL FROM AN ORDER OF
THE COURT OF APPEALS OF KENTUCKY

JURISDICTIONAL STATEMENT

GARIS L. PRUITT
Attorney At Law
320 Second National Bank Bldg.,
Ashland, Kentucky 41101

Garis L. Pruitt
Counsel for Appellant

February ....8....., 1978

ANOTHER ECONOMY PRINTERS PRODUCTION

TABLE OF CONTENTS

	Pages
OPINION BELOW	1
JURISDICTION	2- 3
STATUTES INVOLVED	3- 4
QUESTION PRESENTED	4
STATEMENT OF THE CASE	5- 6
THE CONSTITUTIONAL QUESTION IS SUBSTANTIAL	6
CONCLUSION	6

APPENDICES:

Sentence and Judgment	9-10
Opinion of the Court of Appeals of Kentucky	11-13
Order of the Supreme Court of Kentucky denying Discretionary Review	14
Notice of Appeal to the Supreme Court of the United States	15-19
Entry of Appearance as Counsel	20-22

TABLE OF AUTHORITIES

pages

CASES:

Caslin v. Commonwealth
491 S.W. 2d 832 (Ky. 1973) 2

Weston v. Charleston
27 US 449 (1829) 3

Huffman v. Pursue, Ltd.,
(1975) 420 US 592, 43 L Ed 2d 482, 95 S. Ct., 1200, reh den 421 US 971, 44 L Ed 2d 463, 95 S. Ct. 1969 3

Hicks v. Miranda
(1975) 422 US 332, 45 L Ed 2d 223, 95, S. Ct. 2281 3

FEDERAL STATUTES:

28 USC § 1257 (2) 2

STATE STATUTES:

Kentucky Rules of Criminal Procedure
10.06, 12.54, and 1.10 ..... 3- 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

JASPER FRANK POTTS, - - - - - *Appellant,*

V.

COMMONWEALTH OF
KENTUCKY, - - - - - - - - - *Appellee.*

APPEAL FROM AN ORDER OF
THE COURT OF APPEALS OF KENTUCKY

JURISDICTIONAL STATEMENT

Appellant appeals from a decision of the Kentucky Court of Appeals entered July 8, 1977, which was affirmed by the Supreme Court of Kentucky on October 24, 1977, in its Order denying a Motion for Discretionary Review.

OPINION BELOW

The opinion of the Court below is reported at ..... S.W. 2d (Ky., 197 ..). That opinion and the Order denying Discretionary Review are set forth in the Appendix, *infra*, pp. /4.....

JURISDICTION.

The Court of Appeals refused to consider whether or not the Appellant had had effective assistance of counsel during his trial. The Court of Appeals reasoned that if the issue of ineffective assistance of counsel had not been raised in the trial court, it could not be raised for the first time on appeal. The effect of this is to disallow any review for the question of ineffective assistance of counsel, unless the attorney who is being alleged ineffective, pleads his own ineffectiveness. Because said motion must be filed within five (5) days, counsel on appeal had no opportunity to raise it. Since no attorney is going to plead his own ineffectiveness, the practical effect of this decision is to disallow review for the issue of ineffective assistance of counsel. Thus the appellant brings this appeal pursuant to 28 USC § 1257 (2), challenging the validity of Kentucky Rules of Criminal Procedure 10.06 and 12.54 and their application as stated in *Caslin v. Commonwealth,* 491 S.W. 2d 832 (Ky., 1973).

The Order of the Court of Appeals of Kentucky, from which comes this appeal, was entered July 8, 1977, and mandate was effective on October 24, 1977, when the Supreme Court entered its order denying a Motion for Discretionary Review. The Notice of Appeal was filed in the Kentucky Court of Appeals on November 18, 1977.

This appeal is brought pursuant to 28 USC § 1257 (2).

It is well settled that a final judgment of the highest state court, which involves constitutionality of any

statute or authority exercised under any state, is subject to judicial review in the United States Supreme Court. *Weston v. Charleston,* 27 US 449 (1829).

Other cases supporting jurisdiction are *Huffman v. Pursue, Ltd.,* (1975) 420 US 592, 43 L Ed 2d 482, 95 S. Ct 1200, reh den 421 US 971, 44 L Ed 2d 463, 95 S Ct 1969, and *Hicks v. Miranda,* (1975) 422 US 332, 45 L Ed 2d 223, 95 S Ct 2281.

STATUTES INVOLVED

The Kentucky Rules of Criminal Procedure having the effect of statutes in question read as follows:

Rule 10.06 Time for Motion

The Motion for a new trial shall be served not later than five days after return of the verdict. A motion for a new trial based upon the ground of newly discovered evidence shall be made within one year after the entry of the judgment or at a later time if the court for good cause so permits.

Rule 12.54 Time for taking

The time within which an appeal may be taken to the Court of Appeals shall be ten days after entry of the final order of judgment from which the appeal is taken, or ten days after entry of an order overruling a timely motion for new trial or for arrest of judgment, whichever is the later; provided, however, that in the case of a motion for new trial made later than five days after return of the verdict, upon the ground of

newly discovered evidence, the appeal must be from the order overruling the motion, and the review on appeal shall be limited to the ground timely raised by the motion as authorized by RCr 10.06.

Rule 1.10 Time

The provisions of the Rules of Civil Procedure as to time shall apply to the procedures in the Rules of Criminal Procedure where the latter rules do not specifically provide otherwise. The time shall not be extended for a motion for a new trial, a motion in arrest of judgment, the period for filing the record on appeal (except as provided in Rule 12.58), or the period for taking an appeal.

Kentucky Rules of Criminal Procedure 10.06, page 74; 12.54, page 84; 1.10, page 6.

QUESTION PRESENTED

Do Kentucky Rules of Criminal Procedure 10.06 and 12.54 and their application by the Kentucky Court of Appeals and the Supreme Court of Kentucky, as stated in the case of *Caslin v. Commonwealth of Kentucky*, 491 S.W. 2d 832 (1973), wherein the courts held that any appellant may not raise the question of ineffective assistance of counsel unless the counsel who is being alleged ineffective raises the question of his own ineffectiveness, or else the question will be forever barred, violate the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States and therefore vitiate the conviction of the appellant.

STATEMENT OF THE CASE

The appellant was convicted of statutory rape and sentenced to twelve years imprisonment. He obtained new counsel for appeal. The appellant's new counsel decided that there was an issue as to whether or not the appellant had received effective assistance of counsel in the trial court. This decision was based on trial counsel's failure to conduct an investigation, failure to interview witnesses and failure to introduce discovery motions. Also the appellant's trial counsel failed to have appellant undergo a medical examination, even though both the appellant and his wife stated that the appellant was impotent. Trial counsel also failed to introduce instructions for the jury. Also, the trial counsel did not know how to impeach witnesses, as was shown by a failure to impeach the alleged victim who testified at the preliminary hearing that the principal act had occurred twice a week for two years. The trial counsel didn't use the transcript of the preliminary hearing because he assumed that it would be read to the jury, which resulted in the alleged victim's testimony being accepted without challenge. The Court of Appeals refused to consider the issue reasoning that since the issue of effective assistance of counsel had not been raised in the trial court, that it had not been properly preserved for appeal. However, the issue could not have been raised in the trial court, because the trial counsel obviously wasn't going to raise the issue of his own effectiveness, and the new counsel couldn't raise the issue in the trial court because the short time for motion for a new trial, pursuant to Kentucky Rules of Criminal Procedure 10.06, had passed. The Appellant moved for discretionary review by the

BEST COPY AVAILABLE

Supreme Court of Kentucky alleging that he had been denied due process in that he had not received effective assistance of counsel and the Kentucky Courts offer no means to obtain this Constitutionally guaranteed right. Said Motion was denied.

THE CONSTITUTIONAL QUESTION IS SUBSTANTIAL

The Appellant's case offers substantial federal questions because the Appellant's Constitutionally guaranteed rights of due process, fair trial, and effective assistance of counsel have been compromised so that the Commonwealth of Kentucky could more conveniently expedite appeals and motions for new trial. The power of a state to, in effect, suspend Constitutional rights in the interests of judicial convenience and expedience involves a substantial federal question which requires plenary consideration with briefs on the merits and oral argument.

CONCLUSION

For the reasons set out above, jurisdiction should be noted.

Respectfully submitted,

Garis L. Pruitt
Attorney for Appellant
P. O. Box 405
Ashland, Kentucky 41101

I, Garis L. Pruitt, Attorney for Appellant herein and a member of the Bar of the United States Supreme Court, hereby certify that on the 8th day of February, 1978, I served copies of this Statement of Jurisdiction to the Supreme Court of the United States on the several parties thereto as follows:

1. Commonwealth of Kentucky by mailing a copy in a duly addressed envelope with 1st class postage prepaid to:

Miles H. Franklin, Assistant Attorney General,
Capitol Building
Frankfort, Kentucky 40601
Counsel for Respondent

2. To Clerk of the Supreme Court of Kentucky by mailing a copy in a duly addressed envelope, 1st class postage prepaid to:

Clerk of the Supreme Court of Kentucky
Martha Layne Collins
Room 209
State Capitol
Frankfort, Kentucky 40601

3. To Clerk, Court of Appeals of Kentucky, by mailing a copy in a duly addressed envelope, 1st class postage prepaid to:

John C. Scott
Clerk, Court of Appeals
Twilight Trail
U.S. 127 South
Frankfort, Kentucky 40601

4. To the Assistant Commonwealth Attorney by mailing a copy in a duly addressed envelope, 1st class postage prepaid to:

Avery L. Stanley
Assistant Commonwealth Attorney
Osman Building
Vanceburg, Kentucky

5. To the Honorable Trial Judge, by mailing a copy in a duly addressed envelope, 1st class postage prepaid to:

Honorable Oscar Sammons, Trial Judge
Courthouse
Greenup, Kentucky 41144.

On this the 8th day of February, 1978.

Garis L. Pruitt
Garis L. Pruitt

APPENDICES

Memo:

And afterwards, to-wit; on the 16th day June, 1975, at a Court held for the Greenup Circuit:

GREENUP CIRCUIT COURT
INDICTMENT No. 2191.

June 16, 1975.

Sentence: Judgment of Conviction:

COMMONWEALTH OF KENTUCKY - - - - - *Plaintiff*

Vs:

SENTENCE - JUDGMENT ON INDICTMENT

No. 2191.

On the Charge of Carnal Knowledge.

JASPER FRANK POTTS, - - - - - - - *Defendant*

The defendant was this day brought into Court, was asked if he had any legal cause to show why judgment should not be pronounced against him; upon advice of counsel, none being shown, it is adjudged that the defendant, being ..... years of age, be taken by the Sheriff of Greenup County, to the jail of Greenup County and from there by the Sheriff of said County transferred to the custody of the De-

partment of Corrections and to remain in their custody for the period of not more than 12 years. The Sheriff of said County shall transfer the defendant to the custody of the Department at such location as the Department shall designate.

I, D. B. Crum, Clerk of the Greenup Circuit Court, do certify that the foregoing judgment is a true and correct copy of the judgment in the above styled case, entered on June 13, 1975, in the Greenup Circuit Court and spread upon the Order Book at Page 599.

Witness my hand as Clerk of the Greenup Circuit Court this 16th day June, 1975.

D. B. CRUM, Circuit Court Clerk
Greenup Circuit Court.

By: Thelma Crum, D.C.

Memo: And afterwards, to-wit: on the 9th day June, 1975, at a Court held for the Greenup Circuit:

COURT OF APPEALS OF KENTUCKY

76-257

JASPER FRANK POTTS, - - - - - *Appellant*

V.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE OSCAR SAMMONS, *Judge*
2191

COMMONWEALTH OF
KENTUCKY - - - - - - - - - - *Appellee*

AFFIRMING

* * * *

BEFORE: VANCE WILHOIT and WINTERSHEIMER, Judges.

VANCE, JUDGE: This appeal is from a sentence of twelve (12) years imposed upon appellant's conviction of the crime of having carnal knowledge of a female under the age of 16 years. Appellant raises three issues on the appeal: (1) the evidence was not sufficient to support a verdict of guilt; (2) the court erred in failing to admonish the jury as to the limited use of evidence of sexual acts other than the one for which appellant was tried, and (3) appellant was not afforded effective assistance of counsel.

The evidence against appellant consisted of the uncorroborated testimony of a fifteen-year-old prosecutrix, the step-daughter of appellant who lived in his

home, who was positive in her assertion that appellant had intercourse with her on three occasions over a two year period and fondled her body in an indecent manner on many occasions during that period of time.

An attempt was made to impeach her testimony by showing that she had testified at the examining trial that appellant had intercourse with her once or twice a week or at least 25 times. She denied that she had so testified.

We hold the prosecution testimony was not so incredible or improbable or so at variance with natural laws or common human experience as to be patently untrue. The verdict cannot be disturbed upon the ground of insufficiency of evidence. *Carrier v. Commonwealth*, Ky., 356 S.W. 2d 752 (1962); *Holland v. Commonwealth*, Ky., 272 S.W. 2d 458 (1954).

At the commencement of the trial appellant moved the court to require the prosecution to elect which act would be considered the principal offense and that the prosecution be restricted to any other testimony concerning other acts as merely corroborative of the principal act. When testimony of other acts was introduced the appellant did not request, and the court did not give, an admonition.

The failure to request the admonition constitutes a waiver. *Young v. Commonwealth*, Ky., 335 S.W. 2d 949 (1960). We also note that *Ware v. Commonwealth*, Ky., 537 S.W. 2d 174 (1976) seems to hold that no admonition is required under the circumstances of this case.

The issue of ineffective assistance of counsel has not been presented to the trial court and cannot be raised for the first time in this court.

The judgment is affirmed.

All concur.

ATTORNEY FOR APPELLANT:

Hon. Clifford R. Duvall
Pruitt & Duvall
P. O. Box 405
Ashland, Kentucky 41101

ATTORNEY FOR APPELLEE:

Hon. Robert F. Stephens
Attorney General
Hon. Miles H. Franklin
Assistant Attorney General

SUPREME COURT OF KENTUCKY

SC-361-D
(CA-76-257)

JASPER FRANK POTTS - - - - - - *Movant*

V. GREENUP CIRCUIT COURT
No. 2191

COMMONWEALTH OF
KENTUCKY - - - - - - - - - *Respondent*

ORDER DENYING DISCRETIONARY REVIEW

The motion of Jasper Frank Potts for a review of the decision of the Court of Appeals is denied, and the decision stands affirmed.

ENTERED October 24, 1977.

/s/
JOHN S. PALMORE,
Chief Justice

COURT OF APPEALS OF KENTUCKY

SC-361-D
(CA-76-257)

JASPER FRANK POTTS, - - *Appellant-Movant*

V. NOTICE OF APPEAL TO
SUPREME COURT OF UNITED STATES

STATE OF KENTUCKY - - *Appellee-Respondent*

I. Notice is hereby given Jasper Frank Potts, the appellant above named, hereby appeals to the Supreme Court of the United States, from the final Order of the Supreme Court of Kentucky affirming the judgment of the Court of Appeals of Kentucky and denying Appellant-Movant's Motion for Discretionary Review entered herein on October 24, 1977.

This appeal is taken pursuant to 28 USC section 1257 (2).

Appellant was convicted for the crime of carnally knowing a female under the age of 16 years and over the age of 12 years in violation of Kentucky Revised Statutes 435.100(b) was sentenced to 12 years confinement and is presently enlarged on bail for the sum of $10,000.00.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Record for Court of Appeals.

2. Transcript of Evidence.

3. Brief for Appellant of Court of Appeals.

4. Brief for Appellee Court of Appeals.

5. Order of Supreme Court of Kentucky assigning case to Court of Appeals of Kentucky.

6. Judgment of Trial Court.

7. Decision of Court of Appeals affirming sentence.

8. Movant's Motion for Discretionary Review.

9. Response to Motion for Discretionary Review.

10. Supreme Court Order denying Motion for Discretionary Review and affirming Court of Appeals decision.

11. Notice of Appeal of Supreme Court of United States.

III. The following question is presented by this appeal:

DO KENTUCKY RULES OF CRIMINAL PROCEDURE 10.06 and 12.54 AND THE APPLICATION OF THOSE RULES BY THE COURT OF APPEALS AND THE SUPREME COURT OF KENTUCKY AS STATED IN THE CASE OF *CASLIN VS. COMMONWEALTH*, 491 S.W. 2d 832

(1973) WHEREIN AN APPELLANT MAY NOT RAISE THE QUESTION OF INEFFECTIVE ASSISTANCE OF COUNSEL UNLESS THE COUNSEL WHOM HE ALLEGES IS INEFFECTIVE RAISES THE QUESTION, AND IF NOT RAISED BE FOREVER BARRED: VIOLATE THE DUE PROCESS CLAUSE OF THE 5th and 14th AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND THEREFORE VITIATE THE CONVICTION OF THE APPELLANT.

/s/

GARIS L. PRUITT
Attorney for Jasper Potts
P. O. Box 405
Ashland, Kentucky 41101

PROOF OF SERVICE

I, Garis L. Pruitt, Attorney for Appellant herein and a member of the Bar of the United States Supreme Court hereby certify that on the 14th day of November, 1977, I served copies foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto as follows:

1. Commonwealth of Kentucky by mailing a copy in a duly addressed envelope with 1st class postage prepaid to:
   Miles H. Franklin, Assistant Attorney General, Capitol Building, Frankfort, Kentucky 40601, Counsel for Respondent.

2. To Clerk of the Supreme Court of Kentucky by mailing a copy in a duly addressed envelope, 1st class postage prepaid to the Clerk of the Supreme Court of Kentucky, Martha Layne Collins, Room 209, State Capitol, Frankfort, Kentucky.

3. To Clerk, Court of Appeals of Kentucky, by mailing a copy in a duly addressed envelope, 1st class postage prepaid to:
   John C. Scott, Clerk, Court of Appeals, Twilight Trail, U.S. 127 South, Frankfort, Kentucky 40601.

4. To the Assistant Commonwealth Attorney by mailing a copy in a duly addressed envelope, 1st class postage prepaid to:
   Avery L. Stanley, Assistant Commonwealth Attorney, Osman Building, Vanceburg, Kentucky.

5. To the Honorable Trial Judge by mailing a copy in a duly addressed envelope, 1st class postage prepaid to:

   Hon. Oscar Sammons, Trial Judge, Courthouse, Greenup, Kentucky 41144.

/s/
GARIS L. PRUITT
Attorney for Appellant
P. O. Box 405
Ashland, Kentucky 41101

RECEIPT OF SERVICE

I, Miles H. Franklin, Assistant Attorney General of the State of Kentucky, hereby acknowledge receipt of a copy of the foregoing Notice of Appeal to the Supreme Court of the United States this 20th day of November, 1977.

/s/
MILES H. FRANKLIN

IN THE

Supreme Court of the United States

October Term, 1977

JASPER FRANK POTTS, - - *Appellant-Movant*

V. ENTRY OF APPEARANCE AS COUNSEL

COMMONWEALTH OF
KENTUCKY, - - - - - *Appellee-Respondent*

Garis L. Pruitt, a member of the Bar of the United States Supreme Court, hereby enters his appearance as counsel for the appellant, Jasper Frank Potts, in the above styled action which is an appeal from a decision of the Kentucky Court of Appeals which was affirmed by the Supreme Court of Kentucky.

Garis L Pruitt

GARIS L. PRUITT
Attorney for Jasper Potts
P. O. Box 405
Ashland, Kentucky 41101

I, Garis L. Pruitt, Attorney for Appellant herein and a member of the bar of the United States Supreme Court, hereby certify that on the 8th day of February, 1978, I served copies of this Entry of Appearance as Counsel to the Supreme Court of the United States on the several parties thereto as follows:

1. Commonwealth of Kentucky by mailing a copy in a duly addressed envelope with 1st class postage prepaid to:

Miles H. Franklin, Assistant Attorney General,
Capitol Building
Frankfort, Kentucky 40601
Counsel for Respondent

2. To Clerk of the Supreme Court of Kentucky by mailing a copy in a duly addressed envelope, 1st class postage prepaid to:

Clerk of the Supreme Court of Kentucky
Martha Layne Collins
Room 209
State Capitol
Frankfort, Kentucky 40601

3. To Clerk, Court of Appeals of Kentucky, by mailing a copy in a duly addressed envelope, 1st class postage prepaid to:

John C. Scott
Clerk, Court of Appeals
Twilight Trail
U.S. 127 South
Frankfort, Kentucky 40601

4. To the Assistant Commonwealth Attorney by mailing a copy in a duly addressed envelope, 1st class postage prepaid to:

Avery L. Stanley
Assistant Commonwealth Attorney
Osman Building
Vanceburg, Kentucky

5. To the Honorable Trial Judge, by mailing a copy in a duly addressed envelope, 1st class postage prepaid to:

Honorable Oscar Sammons, Trial Judge
Courthouse
Greenup, Kentucky 41144

On this the 8th day of February, 1978.

Garis L. Pruitt
GARIS L. PRUITT

Supreme Court, U. S.
FILED
FEB 21 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

~~77-1~~1130

JASPER FRANK POTTS - - - - **Appellant**

versus

COMMONWEALTH OF KENTUCKY - - **Appellee**

On Appeal From Court of Appeals of Kentucky

MOTION TO DISMISS OR AFFIRM

ROBERT F. STEPHENS
Attorney General

MILES H. FRANKLIN
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Counsel for Appellee

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3281, LOUISVILLE, KY.

INDEX

	PAGE
CITATIONS	ii
STATEMENT OF THE QUESTION PRESENTED	1
I. THE STATE RULES OF CRIMINAL PROCEDURE INVOLVED AND THE NATURE OF THE CASE	1– 4
A. The Kentucky Rules of Criminal Procedure	1– 2
B. The Proceedings Below	2– 4
II. JURISDICTION	4– 6
III. ARGUMENT—The Issue Raised in the Instant Case Does Not Present a Substantial Federal Question Under the Due Process Clause of the Fifth or Fourteenth Amendments	6– 9
IV. CONCLUSION	9–10
CERTIFICATE OF SERVICE	11
APPENDIX	13–15

TABLE OF AUTHORITIES

Cases:

	PAGE
Bailey v. *Anderson*, 326 U. S. 203, 207 (1945)	5
Cardinale v. *Louisiana*, 394 U. S. 437 (1969)	9
Caslin v. *Commonwealth*, Ky., 491 S. W. 2d 832, 834 (1973)	4–5
DeBacker v. *Brainard*, 396 U. S. 28 (1969)	9
Foster v. *Commonwealth*, Ky., 507 S. W. 2d 443, 445-446 (1974)	8
King v. *Commonwealth*, Ky., 387 S. W. 2d 582 (1965)	8
Lay v. *Commonwealth*, Ky., 506 S. W. 2d 507 (1974)	8
Powell v. *Alabama*, 387 U. S. 45 (1932)	6, 7
Williams v. *Georgia*, 349 U. S. 375, 382-3 (1955)	5

Constitution:

United States Constitution, Sixth Amendment	6
United States Constitution, Fourteenth Amendment	6

Statutes:

Kentucky Revised Statute 435.100(1)(b)	2

Other:

Kentucky Rules of Appellate Procedure 1.180	3
Kentucky Rule of Criminal Procedure 9.22	2, 8
Kentucky Rule of Criminal Procedure 10.06	2, 4, 6
Kentucky Rule of Criminal Procedure 11.42	2, 6, 7, 8, 9
Kentucky Rule of Criminal Procedure 12.54	2, 4, 6
28 U.S.C. §1257(2)	4, 5, 6, 9

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

JASPER FRANK POTTS - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - *Appellee*

ON APPEAL FROM COURT OF APPEALS OF KENTUCKY

MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeals of Kentucky on the ground that it is manifest that the issue on which the decision of the case depends does not present a substantial federal question.

STATEMENT OF THE QUESTION PRESENTED

Whether the Question in the Instant Case Raises a Substantial Federal Question Under the Due Process Clause of the Fifth and Fourteenth Amendments So As to Warrant Review by This Court?

I.

THE STATE RULES OF CRIMINAL PROCEDURE INVOLVED AND THE NATURE OF THE CASE.

A. The Kentucky Rules of Criminal Procedure.

Appellant tells us that he is contesting the constitutional validity of two Kentucky Rules of Criminal

Procedure, hereinafter cited as RCr, 10.06 and 12.54. They are correctly set forth in Appellant's Brief at pages 3-4. Contrastingly, appellee is of the opinion that another procedural prerequisite, RCr 11.42, has been overlooked by appellant. RCr 11.42 is found in Appellee's Appendix "A". RCr 11.42 is the procedural method of attacking the degree of assistance rendered by trial counsel and of raising this allegation before the trial court. The overall effect of RCr 11.42, pertaining to post conviction relief, is to allow a prisoner in custody, who is found guilty and sentenced to imprisonment within the Commonwealth of Kentucky, to collaterally attack the validity of the judgment through the procedure outlined.

RCr 9.22 is of corollary importance and is found at Appellee's Appendix "B".

It should be pointed out that these criminal rules were judicially promulgated to govern procedure and practice in all criminal proceedings and are intended to provide a just determination of every criminal action.

B. The Proceedings Below.

Appellant was convicted of the offense denounced by Kentucky Revised Statute 435.100(1)(b), carnal knowledge of a female of the age of twelve years and under sixteen. He was convicted and sentenced to twelve years of imprisonment. The unreported opinion from the Court of Appeals of Kentucky, No. 76-257, affirming the conviction of Jasper Frank Potts is correctly set forth in Appellant's Appendix at pages

11-13 of his appeal. Because the assertion set forth by appellant concerns only whether defense counsel (a different lawyer than the one who prosecuted the appellate stages in the Kentucky Courts and this appeal) rendered effective assistance at the trial level, the appellee does not deem it necessary to enumerate the evidentiary testimony that resulted in Mr. Potts' conviction. Mr. Potts' Brief on Appeal has charged his defense counsel with ineffective assistance of counsel in that: he failed to seek a bill of particulars in reference to the indictment; he spent an inadequate amount of time in interviewing Mr. Potts and investigating the whereabouts of certain defense witnesses enumerated by Mr. Potts; that he failed to adequately impeach the prosecutrix on the basis of her previous testimony at the preliminary hearing; and that he failed to submit appropriate jury instructions.

In its Opinion affirming the conviction of Mr. Potts, the Kentucky Court of Appeals disposed of Mr. Potts' allegation that he was not afforded effective assistance of counsel by stating:

> The issue of ineffective assistance of counsel has not been presented to the trial court and cannot be raised for the first time in this Court.

Mr. Potts sought discretionary review in the Supreme Court of Kentucky pursuant to Kentucky Rules of Appellate Procedure 1.180, which allows the Kentucky Supreme Court to review a decision of the Kentucky Court of Appeals as a matter of sound discretion and where there are specific reasons why the judgment

should be reviewed. The Kentucky Supreme Court, in an unreported Opinion, #SC-361-D, found at page 14 of Appellant's Appendix, denied such review, thus affirming the Kentucky Court of Appeals decision.

Mr. Potts' appellate counsel, retained subsequent to the expiration period for motion for new trial (RCr 10.06), asserts that the intermediary appellate court erroneously refused to consider the issue of whether defense trial counsel rendered effective assistance. It is further argued that because no trial attorney would challenge his own effectiveness at the trial level, therefore appellant has no forum, save on direct appeal, to litigate the issue unchallenged by the defense attorney as to his own effectiveness.

II.

JURISDICTION

Appellant's application to invoke the jurisdiction of this Court should be denied because it fails to meet the jurisdictional requirements of 28 U.S.C. §1257(2), the proper provision for review of a state statute that has been drawn in question in a criminal case on appeal. Appellant premises his appeal upon a challenge to the constitutional validity of two RCrs, 10.06 and 12.54, and their application as stated in *Caslin* v. *Commonwealth,* Ky., 491 S. W. 2d 832, 834 (1973), wherein it was stated:

> Another assignment of error is that appellant had inadequate legal representation. He cites several examples to support his contention. The

> question of inadequacy of counsel was never presented in the lower court. This is not an error therefore that is reviewable on direct appeal. This court is exclusively a reviewing court except in original cases authorized by . . . the Kentucky Constitution. . . .

Appellee respectfully disagrees with appellant's contention and submits that this appeal should be denied because of the fact that where a federal question is initially raised in the highest state court, which refuses to consider any issue not presented to the trial court, the jurisdiction of the Supreme Court cannot attach, *Bailey* v. *Anderson,* 326 U. S. 203, 207 (1945). Only if the highest state court considers and disposes of the question so raised, can Supreme Court review be obtained.

The jurisdictional requirement relative to raising of a substantial federal question is formalized in subsection (2) of §1257 as being the validity of a state statute "drawn in question." Thus this phrase "drawn in question" refers to the raising of a substantial federal question in the correct manner, and the proper method of raising the federal question is dependent upon the state procedural practice, particularly where the litigant has a reasonable opportunity to have such an issue heard and determined. Generally the litigant must follow the state procedures in raising a federal question and it must be presented to the trial court at the point considered appropriate under state procedure. *Williams* v. *Georgia,* 349 U. S. 375, 382-3 (1955); thus if a reasonable state procedural require-

ment is not observed, the Supreme Court will decline to exercise jurisdiction both where the highest state court expressly refuses to decide the federal question for this procedural reason and where the highest state court is completely silent on the federal question. This being so, the respondent submits that the petitioner has failed to establish a jurisdictional basis. Therefore this appeal should be denied because it fails to meet the jurisdictional requirements of 28 U.S.C. 1257(2).

The appellee will now endeavor to respond to the above contention that appellant was denied the opportunity to litigate the issue of effective assistance counsel as though this issue were before the Court, even though appellee maintains it is not.

III.

ARGUMENT

The Issue Raised in the Instant Case Does Not Present a Substantial Federal Question Under the Due Process Clause of the Fifth or Fourteenth Amendments.

In *Powell* v. *Alabama,* 387 U. S. 45 (1932), this Court held that the right to counsel under the Sixth Amendment as applied through the due process clause of the Fourteenth Amendment meant "the effective assistance of counsel." The claim of convicts that their trial defense counsel was ineffective or incompetent is a familiar one to trial judges and appellate courts. Such claims asserted in motions for a new trial (RCr 10.06), in direct appeals (RCr 12.54), in collateral proceedings to vacate judgment (RCr 11.42), or in federal

habeas corpus review, have been made with increasing frequency in the years since the Supreme Court in *Powell, supra,* interpreted the adjective "effective" in the Sixth Amendment's requirement of "the assistance of counsel." The inadequate representation claim has a number of modifications: (1) the convict's natural inclination to utilize hindsight, sharpened by disappointment and nutured by ample time for contemplation, in assessing his trial defense counsel's performance; (2) the convict's second thoughts concerning his plea of guilty and the advice of counsel which lead to it, and (3) constructing a foundation for collateral attack upon conviction. Since the drawing of federal petitions for writs of habeas corpus and state petitions for post conviction relief based upon collateral attack have become a popular indoor activity in penal institutions, the hindsight motivation has been the principle one behind claims of ineffective representation. Jailhouse lawyers are not however the only ones to second guess trial defense counsel. The practice is not surprisingly prevalent where the convict has secured post trial counsel to survey the languishing dilemma. The question has been then how do courts determine what is and is not effective assistance of counsel?

A state prisoner in custody who is found guilty and sentenced to imprisonment within the Commonwealth of Kentucky may collaterally attack the validity of the judgment through the procedure outlined in RCr 11.42. A principal ground that could be raised on an RCr 11.42 is that the defendant had ineffective assistance of counsel at his trial. The defendant cannot set aside a

judgment through a collateral attack by raising mere errors at trial. Errors that were committed at trial which might have been raised on appeal will not be grounds for setting aside the judgment at a later time unless such errors are a violation of constitutional rights; *King* v. *Commonwealth,* Ky., 387 S. W. 2d 582 (1965). The defendant in order to obtain relief under RCr 11.42 must show a violation of a constitutional right or lack of jurisdiction or such a violation of a statute that would make the judgment void; *Lay* v. *Commonwealth,* Ky., 506 S. W. 2d 507 (1974). Thus, unless an appellant makes known to the trial court his complaint of ineffective legal assistance either during the proceedings below or as grounds for a motion for a new trial then that argument is not preserved for appellate review. RCr 9.22. The Supreme Court of Kentucky has most recently enunciated this principal in *Foster* v. *Commonwealth,* Ky., 507 S. W. 2d 443, 445-446 (1974) wherein it was stated:

> Foster filed a supplemental brief, pro se, in which he claims ineffective assistance of his trial counsel (a different lawyer than the ones prosecuting this appeal.) The trial court was not made aware of this complaint during the trial nor was this contention contained in the motion for a new trial, therefore this ground was not preserved for appellate review. RCr 9.22. . . .

Because the question of inadequacy of counsel was never presented to the Kentucky trial court, this issue is not reviewable on direct appeal to a Kentucky appellate court, the latter being exclusively a reviewing

court except in certain specialized cases authorized under the Kentucky Constitution. It is patently obvious that the sole question asserted by appellant has never been raised collaterally, preserved, or passed upon in the state courts below.

It was very early established that this Court will not decide constitutional issues raised here for the first time pertaining to state court decisions. In a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes and procedural rules in light of a constitutional challenge since the statutes and procedural rules may be construed in a way which saves their constitutionality or the issue may be blocked by an adequate state ground. Not only is this appeal improvident, it is not subject to review by this Court by way of appeal pursuant to 28 U.S.C. 1257(2). *Cardinale* v. *Louisiana,* 394 U. S. 437 (1969); *DeBacker* v. *Brainard,* 396 U. S. 28 (1969).

IV.

CONCLUSION

The issue presented by the appellant alleging a denial of the issue of effective assistance of counsel has not been pursued pursuant to RCr 11.42. Thus the appellant has failed to meet the jurisdictional requirements, 28 U.S.C. 1257(2). Wherefore, appellee submits that the question upon which this cause depends is so unsubstantial as not to need any further argument, and appellee respectfully moves the Court to dismiss

this appeal or, in the alternative, to affirm the judgment entered in the cause by the Court of Appeals of Kentucky.

Respectfully submitted,

ROBERT F. STEPHENS
Attorney General

MILES H. FRANKLIN
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

Counsel for Appellee

CERTIFICATE OF SERVICE

I, MILES H. FRANKLIN, counsel for appellee, hereby certify that the foregoing Motion to Dismiss or Affirm was served on appellant by depositing three copies each of same in the United States mail, first class postage prepaid, this ____ day of _____, 1978, addressed to counsel for appellant, HON. GARIS L. PRUITT, P. O. Box 405, Ashland, Kentucky 41101.

MILES H. FRANKLIN
Assistant Attorney General
Office of the Attorney General
Capitol Building
Frankfort, Kentucky 40601

Appendix

APPENDIX "A"

Rule 11.42. Motion to vacate, set aside or correct sentence.—(1) A prisoner in custody under sentence who claims a right to be released on the ground that the sentence is subject to collateral attack may at any time proceed directly by motion in the court which imposed the sentence to vacate, set aside or correct it.

(2) The motion shall be signed and verified by the movant and shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion.

(3) The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding.

(4) The clerk of the court shall notify the attorney general and the commonwealth's attorney in writing that such motion (whether it be styled a motion, petition or otherwise) has been filed, and the commonwealth shall have 20 days after the date of mailing of notice by the clerk to the attorney general in which to serve an answer on the movant.

(5) Affirmative allegations contained in the answer shall be treated as controverted or avoided of record. If the answer raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing and, if the movant is without counsel of record and is financially unable to employ counsel, shall appoint counsel to represent him in the proceeding, including appeal.

(6) At the conclusion of the hearing or hearings the court shall make findings determinative of the material issues of fact and enter a final order accordingly. If it appears that the movant is entitled to relief, the court shall vacate the judgment and discharge, resentence, or grant him a new trial, or correct the sentence as may be appropriate.

(7) Either the movant or the commonwealth may appeal from the final order or judgment of the trial court in a proceeding brought under this rule.

(8) The final order of the trial court on the motion shall not be effective until expiration of time for notice of appeal under RCr 12.54 and shall remain suspended until final disposition of an appeal duly taken and perfected.

(9) Counsel appointed for the movant under this rule shall be entitled to reimbursement by the commonwealth for his reasonable expenses of travel and subsistence for necessary conferences with the movant at his place of confinement, provided that each trip made for that purpose be authorized in advance thereof by order of the trial court.

(10) Original applications for relief of the nature described in this rule that are addressed directly to a court other than the one in which the sentence was imposed shall be transmitted to the court in which the sentence was imposed for further disposition in the manner above set forth. (Amended September 23, 1964, effective January 1, 1965; amended September 8, 1969, effective January 1, 1970; amended June 16, 1970, effective September 1, 1970; amended June 18, 1976, effective July 1, 1976.)

APPENDIX "B"

Rule 9.22. Objections, exceptions unnecessary.—Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court, and on request of the court, his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.